JONG CHUK

v.

CHONG TUNG SANG & ORS (NO 5)

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[SUIT NO: KG 104/94/II]
12 APRIL 1999

CONTRACT: *Fraud - Sale of land procured by civil fraud - Purchaser supposed to be bound by another agreement but had no intention to be so bound - Whether conduct and intention fraudulent - Whether breach of other agreement renders sale and purchase null and void - Whether fraud to be proved on civil or criminal standard of proof - Whether specific performance of other agreement ought to be ordered - Whether purchase price ought to be refunded to purchaser - Contracts Act 1950, ss. 17(c), 17(d), 65 & 66*

LAND LAW: *Sale of land - Fraud - Purchaser supposed to be bound by another agreement but had no intention to be so bound - Whether sale and purchase null and void - Whether title registered in name of purchaser indefeasible - Land Code (Cap 81) (Sarawak,) ss. 132(1) & 134(1)*

The plaintiff entered into a development agreement with the 1st – 5th defendants to develop a piece of land ('the land') belonging to the 1st – 5th defendants. The land was later sold to the 6th defendant. However, in the sale and purchase agreement, the 6th defendant agreed to be bound by the development agreement and further to this, the 6th defendant granted a power of attorney to the plaintiff enabling the plaintiff to proceed with developing the land. Barely three days after the plaintiff submitted his notice of commencement of work, the 6th defendant notified the plaintiff that the power of attorney was revoked and asked the plaintiff to vacate the land within 24 hours. This was done notwithstanding the fact that the development agreement contained a clause stating that in the event of a breach, 3 months notice must be given specifying the breach or breaches to be remedied. The plaintiff then commenced this suit against the defendants seeking specific performance of the development agreement and damages. The 1st to 5th defendants in turn brought a third party action against the 6th defendant as the sale and purchase agreement contained a clause which stated that the 6th defendant agreed to indemnify the 1st to 5th defendants against all claims for non-observance of the development agreement.

The plaintiff contended that the 6th defendant had falsely and/or fraudulently represented that it would honour the development agreement when in fact it never intended to do so as it had plans to develop the land into a water theme park. Evidence to this effect was adduced by the plaintiff. The 1st to 5th defendants contended that they did not know about the 6th defendant's intention to develop the water them park and that had they known, they would not have sold the land to the 6th defendant. Further, the 1st to 5th defendants argued that the 6th defendant was bound by the development agreement and that in any case they were indemnified by the 6th defendant pursuant to the sale and purchase agreement.

As against the 1st to 5th defendants, the plaintiff contended that they were in breach of the development agreement by failing to inform him of the sale of the land to the 6th defendant.

Held:

[1] There was ample evidence to establish that the 6th defendant had no intention to be bound by the terms and conditions of the development agreement from the very beginning as it had at all material times intended to convert the land into a water theme park. Thus, the conduct and intention of the 6th defendant were fraudulent within the ambit of s. 17 (c) & (d) Contracts Act 1950.

[2] The revocation of the power of attorney and the termination or repudiation of the development agreement by the 6th defendant were wrongful since the 6th defendant failed to give the three month notice as per cl. 18 of that agreement.

[3a] An allegation of criminal fraud in civil or criminal proceedings cannot be based merely on suspicion or speculation. However, where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, a balance of probabilities is applicable. Since the allegation of fraud against the 6th defendant is purely civil in nature and not based on or connected with a criminal offence, the civil standard of proof is applicable.

[3b] The 6th defendant procured the sale and purchase agreement and the memorandum of transfer by fraud and these are therefore null and void and ought to be set aside for fraud. Therefore, the title of the 6th defendant to the land is not indefeasible by reason of fraud. Thus, under s. 134(1) of the Land Code (Cap 81) (Sarawak), the purported transfer and registration of the land in the name of the 6th defendant would be void against the 1st to 5th defendants who were the parties defrauded.

[4] The plaintiff had clearly accepted that the 1st to 5th defendants were entitled under c. 22 of the development agreement to sell the land to the 6th defendant without the knowledge or consent of the plaintiff. The plaintiff did not object or complain about the sale of the land to the 6th defendant. Thus, the plaintiff had by his conduct acquiesced in the 6th defendant stepping into the shoes of the 1st to 5th defendants for the purpose of carrying out the development of the land.

[5] Notwithstanding the fraud on the part of the 6th defendant, by virtue of ss. 65 and 66 of the Contracts Act 1950, it is just and equitable that the 1st to 5th defendants refund to the 6th defendant the whole of the purchase price less the damages and costs due to the 1st to 5th defendants.

[Order accordingly.]

Case(s) referred to:

Alghussein Establishment v. Eton College [1988] 1 WLR 587 ***(refd)***
Ang Hiok Seng v. Lim Yut Kiu [1997] 1 CLJ 497 ***(refd)***
Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***
Cheall v. Apex [1983] 3 All ER 1130 ***(refd)***
Dr Michael Atun Wee v. Malaysia Credit Finance Bhd & Ors [1994] 3 MLJ 594 ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd; Bhagat Singh Surian Singh & Ors (Interveners) [1996] 4 CLJ 52 ***(refd)***
Loi Hieng Chiong v. Kon Tek Shin [1983] 2 CLJ 70 ***(refd)***
Menaka v. Lum Kum Chum [1977] 1 MLJ 91 ***(refd)***
Ong Ban Chai v. Seah Siang Mong [1998] 3 CLJ 637 ***(refd)***
PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136 ***(refd)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 ***(refd)***
Suu Lin Chong v. Lee Yaw Seong [1979] 2 MLJ 48 ***(refd)***
Yeep Mooi v. Chu Chin Hua & Ors [1981] 1 MLJ 14 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 17(c), (d), 65, 66
Rules of the High Court 1980, O. 59, r. 19
Land Code (Cap 81) (Sarawak), ss. 132(1), 134(1)

Reported by Izzaty Izzuddin

JUDGMENT

Muhammad Kamil Awang J:

Background Facts

The plaintiff entered into a development agreement dated 22 October 1991 (AB3) ("the said agreement") with the 1st - 5th defendants to develop a piece of land known as Lot 29, Block 218, Kuching North Land District, measuring 1.2303 hectares ("the said land") originally owned by them. By a subsequent agreement dated 25 May 1993 (AB 29) ("the 2nd agreement") the 1st - 5th defendants sold the said land to Bacom Enterprises Sdn. Bhd, the 6th defendant/third party ("6D/TP"), subject, in my opinion, to two important provisions of the 2nd agreement and one important provision of the said agreement, *ie:*

(1) Under cl. 7 of the 2nd agreement (AB 30), 6D/TP is bound by the said agreement read with the deed of variation of 19 February 1992 (AB 22) between the plaintiff and the 1st - 5th defendants. That cl. 7 reads as follows:

> 7. The Purchaser hereby declares that in entering into this transaction with the Vendors, it has full knowledge and understanding of the Agreement, Deed and Power of Attorney, and upon registration of Memorandum/ Memoranda of Transfer referred to in clause 3 hereof being effected, it is bound by the provisions of the Agreement read together with the Deed.

Nothing turned on the said deed because the authorities did not approve the shoplots stated therein. So only the said agreement remains material.

(2) Under cl. 8 of the 2nd agreement (AB 30), 6D/TP shall, *inter alia,* indemnify the 1st - 5th defendants against all claims for non-observance of the said agreement. Clause 8 reads as follows:

> The Purchaser hereby covenants with the Vendors that the Purchaser will perform and observe all stipulations agreements provisions and conditions respectively which are mentioned or contained in the Agreement and the Deed and on the part of the Vendors thereby agreed to be performed and observed and will keep the Vendors indemnified against all actions proceedings claims demands damages penalties costs charges and expenses by reason of non-observance of the Agreement and Deed or otherwise in relation thereto.

(3) Under cl. 13 of the said agreement, it is provided as follows:

Upon the signing hereof, the Owners [1st - 5th Defendants] shall grant and execute a Power of Attorney appointing the Developer as their lawful Attorney without authority to raise Loan but only to do the following acts as mentioned below:

(a) to appear before all relevant authorities in respect of the development of the said land;

(b) to sign and execute the Memorandum of Surrender and Realienation of the said land;

(c) to obtain new issue documents of title following title conversion, subdivision and mutation of the said land;

(d) to submit all requisite plans for the development of the said land;

(e) to apply to SESCO for the supply of electricity and the connection of electricity lines to the subdivided lots; and

(f) to apply to Kuching Water Board for the supply of water pipes to the subdivided lots.

Pursuant to the said cl. 13, 6D/TP gave on 26 May 1993 a Power of Attorney to the plaintiff. It is useful to quote recital three of the Power of Attorney as follows:

3. To apply for or cause to be applied for approval of the subdivision, amalgamation, survey conversion of title condition, together with relevant engineering and building plans on the said land relating to and connecting with the development of the relevant building scheme(s) and all this is supplemental to an Agreement made between our predecessors-in-title, Chong Tung Sang (BIC.K. 588012), Chong Tung Shin (BIC.K. 229286), Chong Nyuk Yun alias Chong Nyet Yun (f) (BIC.K. 265062), Peter Chong Kui Choi (BTC.K. 264905) and Chong Tung Fatt alias Joseph (BIC.K. 179955), from whom we acquired the said land, and Jong Chuk (BICK. 266171) of Sublot 4, Lot 64, 2nd floor, Jalan Datok Ajibal Abol, 93400 Kuching, Sarawak, dated the 22nd day of October, 1991 for the development of the said land into the relevant building scheme(s) (hereinafter referred to as "the said Agreement").

Fraudulent intention and conduct of 6D/TP

When the plaintiff's engineering plans were approved by the authorities on 2 April, 1994 (AB 113), and after the plaintiff, pursuant to the said agreement, had submitted his notice of commencement of works dated 11 May 1994 (AB 125) barely three days later 6D/TP by letter dated 14 May 1994 (AB 122) notified the plaintiff of its earlier revocation of the Power of Attorney on 30

April 1994 and asked the plaintiff to vacate the said land within 24 hours, thus evincing a very clear signal from the very beginning that 6D/TP had no intention whatsoever to be bound by the said agreement when it signed the 2nd agreement with the 1st - 5th defendants on 25 May 1993. This letter merits reproduction and reads as follows (AB 122):

BACOM ENTERPRISES SDN. BHD.
1st Floor, Lot 317, Jalan Satok, P.O. Box 3120
93760 Kuching, Sarawak, Malaysia.
Tel No.: 419003 419602 Telex No: BACOM MA 70574

Our Ref BE/ADM/GEN/94/01 Date: 14/5/94

Mr. Jong Chuk (BIC K266171) **BY A/R REGISTERED**
Sublot 4, Lot 64, 2nd Floor
Jalan Datuk Ajibah Abol
93400 Kuching

Dear Sir

LOT 29 BLOCK 218 KNLD

This serves to inform you that you no longer have the power of attorney over our land as it was revoked on 30th April 1994.

In that context, you are instructed to vacate from our land and remove your personal belongings within twenty four hours of receipt of this letter, otherwise you will be considered trespassing.

The Land & Survey Department and Kuching Rural District Council have been informed of this revocation. In this connection, they would stop all development application.

We hope for your kind co-operation herein.

Yours faithfully
for BACOM ENTERPRISES SDN BHD

(sgd.)

DAVID S C GOH

Thus the evidence is very clear that from the very beginning that both the intention and conduct of 6D/TP were fraudulent within the ambit of s. 17(c) and (d) of the Contracts Act 1950. In my opinion, there can be no doubt, on the evidence, that 6D/TP was guilty of civil fraud. See *Ang Hiok Seng v. Lim Yut Kiu* [1997] 1 CLJ 497; [1997] 3 MLJ 45 FC, at p. 59, applied by the Court of Appeal in *Ong Ban Chai v. Seah Siang Mong* [1998] 3 CLJ 637; [1998] 3 MLJ 346, regarding criminal fraud and civil fraud. It is convenient here to quote s. 17 of the Contracts Act 1950 which reads as follows:

"Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(b) the active concealment of a fact by one having knowledge of belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive; and

(e) any such act or omission as the law specially declares to be fraudulent.

Trial On Liability

As a result of the breach of the said agreement on the part of 6D/TP and consequently on the part of the 1st - 5th defendants, the plaintiff brought this action against the 1st - 5th defendants and 6D/TP. The 1st - 5th defendants in turn brought a third party action against 6D/TP. Both actions were tried together.

At the outset on 11 November 1996, learned counsel for the parties agreed that the parties would be bound throughout the proceedings by two documents dated 9 November 1996 *viz*:

(a) Statement of agreed facts - marked A; and

(b) Agreed issues to be tried - marked B.

It should be noted that they remained the same throughout the entire proceedings. There is also an agreed bundle of documents, marked "AB".

It may also be noted that it was agreed on 11 November 1996 (page 2 notes of proceedings) that the question of damages, if any, was to be decided later on. Therefore the trial is only on the question of liability of the 1st - 5th defendants and 6D/TP.

Plaintiff's Case

The plaintiff testified that he had been in the business of contractors and developers for over 30 years. Under the said agreement the landowners would get six units and he 18 units.

As the application for shoplots was not approved (AB 111), the said agreement would remain effective as provided under the Deed of Variation, cl. 1(6) (AB 23).

It was not in dispute that the plaintiff's engineering plans were approved on 2 April 1994 as evidenced by a letter of that date from the Land & Survey Department (AB 113). Shortly thereafter the plaintiff submitted his notice of commencement of works to the authority on 11 May 1994 (p. 3 notes of proceedings). Then 6D/TP wrote to Kuching Rural District Council (KRDC) on 14 May 1994 effectively to stop the plaintiffs works (AB 118). This letter reads as follows:

BACOM ENTERPRISE SDN BHD
1st Floor, Lot 317, Jalan Satok, P. O. Box 3120
93760 Kuching, Sarawak, Malaysia
Tel No.: 419003 419002 Telex No: BACOM MA 70574

Our Ref: BE/ADM/GEN/94/02 Date: 14/5/94

The Chairman **BY HAND**
Kuching Rural District Council
10th Mile, Penrissen Road
Kuching

Dear Sir

LOT 29 BLOCK 218 KNLD

This is to inform you that Mr Jong Chuk (BIC K266171) is no longer our P/A holder.

Enclosed herewith, please find a copy of the document in title and deed of revocation.

This is to inform you that we do not wish to proceed with anything that Mr Jong Chuk has undertaken.

Please kindly acknowledge receipt of this letter.

Thank you.

Yours faithfully

for BACOM ENTERPRISES SDN BHD

(sgd.)

DAVID S C GOH

6D/TP sent an identical letter of the same date (AB 123) signed by David Goh addressed to the Superintendent of Land & Survey Department with a copy to the Director of Land & Survey Department. 6D/TP had earlier revoked the Power of Attorney of the plaintiff on 30 April 1994 (AB 115). The plaintiff

was later notified of this on 14 May 1994 (AB 112). After the revocation of the Power of Attorney and stoppage of work ordered by 6D/TP, the plaintiff was in no position to continue his project on the said land. David Goh under cross-examination by Mr Wong Kim Fatt, learned counsel for the plaintiff also admitted this (p. 94 notes of proceedings) and when he was referred to the letter dated 7 July 1994 from the Land & Survey Department (AB 130) addressed to the plaintiff's consultants, Messrs Jurutera CMP (Sarawak) Sdn Bhd. This letter stated that the plaintiff had no authority to proceed further with development of the said land. The plaintiff had stated in his evidence that he would be able to complete the works in time (p. 7 notes of proceedings). He was not challenged on this during the cross-examination by the then learned counsel for 6D/TP. The plaintiff now seeks specific performance of the said agreement and damages.

Under cross-examination by Mr Fabian Lim, learned counsel for the 1st - 5th defendants, the plaintiff said (p. 9 notes of proceedings):

> After approval of sub-division, then the approval of the engineering plan. Without approval of engineering plan I cannot commence work for the drains and roads.
>
> Notice to commence work on roads and drains and not for building houses. Letter (page 125 AB) was not for constructing of houses.
>
> After the engineering plan was approved I instructed a firm to prepare the building plans for approval.
>
> This firm is Jurutera CMP (Sarawak) Sdn Bhd - (page 126 AB).
>
> Letter of CMP to Land & Survey - dated 26th May, 1994.
>
> My consultant submitted to KRDC the building plans but the other party stopped it.
>
> **Question:** Did you instruct CMP to prepare the building plans as well as the structural plan?
>
> **Answer :** Yes.

It was contended for 6D/TP that the plaintiff was not speaking the truth on the building plans. Learned counsel for the plaintiff, Mr Wong Kim Fatt submitted that although the plaintiff said his consultants submitted to KRDC the building plans, he really had no intention to mislead the court - that was probably his impression or honest belief because, as a matter of fact, he had after the engineering plans were approved on 2 April 1994, instructed Messrs CMP to submit the building plans (AB 126 and 140). Furthermore the building plans were not an issue to be tried. I accepted Mr Wong's submission. I find the plaintiff to be a credible and truthful witness. It is not in dispute that,

before the plaintiff could commence works on the said land after giving notice of commencement dated 11 May 1994, 6D/TP had revoked the Power of Attorney on 30 April 1994 (AB 115) and told him of this only two weeks later in a letter dated 14 May 1994 (AB 122) requiring him to vacate the said land within twenty four hours. It is significant to note that in the letter dated 14 May 1994 given by 6D/TP and signed by David S.C. Goh, and prior to the revocation by 6D/TP of the Power of Attorney on 30 April 1994, there was no complaint of any breach or serious breach of the said agreement committed by the plaintiff. I find there was none. In my opinion, the revocation of the Power of Attorney and the termination or repudiation of the said agreement by 6D/TP were wrongful for, *inter alia*, failure to give the three month notice in writing under cl. 18 of the said agreement specifying the breach or breaches to be remedied. Under cross-examination, David Goh admitted he did not give the three month notice, he said (at p. 91 notes of proceedings):

> I consider rubbish is a very serious breach. I did not give notice to terminate under clause 18.
>
> I wanted to give him [the plaintiff] a chance.

Later under cross-examination he talked of his alleged verbal notice given in January 1994 (p. 93 notes of proceedings). There was no precise date of service and no dates on which the three month period was to begin and end. David Goh was evasive on this subject (see pp. 86 and 87 notes of proceedings). He agreed he was in court because of his failure to give notice of termination. There was no contemporaneous document on the alleged verbal notice. I find as a fact there was no such verbal notice.

The plaintiff had under cross-examination stated that he could complete the work on time. This was not challenged by the 1st -5th defendants or 6D/TP.

The next material witness for the plaintiff was Ismawi Bin Batu (PW2) who was the former Group Chairman of 6D/TP. He was involved in the said land from the very beginning. He testified that the Water Theme Park of 6D/TP was planned before the purchase of Lot 29, *ie*, the said land, and there were two other lots of land involved. Clauses 7 and 8 of the 2nd agreement (AB 30) were important to the 1st - 5th defendants, who would not sell the said land without these two clauses (p. 22 notes of proceedings). It is clear from the evidence of Ismawi Batu that the plaintiff was able to complete the project and that 6D/TP had no intention of honouring the said agreement. Ismawi said (at p. 23 notes of proceedings):

Plan of Bacom to turn into a Water Theme Park - involving 3 pieces of land. If Jong Chuk carried out his building plan, it would not be possible to build the Water Theme Park with a road frontage.

Bacom over came the problem by Bacom plan to revoke the Power of Attorney.

David Goh drafted the letter dated 22 June 1993 for land conversion to the Land & Survey Department (AB 78) when the Power of Attorney was still in force and when the plaintiff was still working on the project under the said agreement. This letter drafted by David Goh and signed by his chairman Ismawi (PW2) is clear and unequivocal proof of fraudulent intention of 6D/TP and David Goh not to honour the said agreement. This revealing letter speaks for itself and merits full reproduction as follows:

BE/ADM/GEN/93/08 22/6/93

BY HAND

The Superintendent
Land & Survey Department
1st Division
Jalan Badruddin
93000 KUCHING

Dear Sir

Application For Land Conversion In Respect Of:

i) Lot 29 Block 218, KNLD - 1.2302 Hectare
ii) Lot 26 Block 218, KNLD - 1.2950 Hectare
iii) Lot 144 Block 207, KNLD - 0.8944 Hectare

We refer to the above 3 parcels of adjoining land and wish to apply for their conversion into commercial zone.

Our development project will require a total area of approximately 4 hectares (10 acres) consisting the following concepts:

1) A water recreational park;
2) A food park featuring local snacks and cuisines;
3) A warehouse sales outlet for family-size consumers.

Our land acquisition has progress to the following status:

1) Lot 29 Block 218 KNLD - Owned. Please refer photocopy of document title attached.

2) Lot 26 Block 218 KNLD - Purchased. Please refer Sales & Purchase Agreement dated 15 May 1993 for settlement date on 6 August 1993.

3) Lot 144 Block 207 KNLD - To be purchased. Mr. Tan Boo Eng who is the Power of Attorney holder (photocopy of print out of Title and PA documents enclosed), has given us a letter of undertaking to sell the said land to the Company.

We are planning to change the previous approval but would not withdraw or cancel it until such time as our commitments have expired. In the meantime, we want to put in this fresh proposal for your consideration.

Yours faithfully
for BACOM ENTERPRISES SDN BHD

(sgd.)

ISMAWI BATU
Group Chairman

cc. The Director
Land & Survey Department
Jalan Simpang Tiga
93300 KUCHING.

In his testimony, Ismawi Batu said (p. 23 notes of proceedings):

Bacom wrote to Land & Survey to apply for commercial zone on the same piece of land.

This was done when Jong Chuk still had the Power of Attorney.

(Page 78 AB) This is the letter I was referring to, and I signed it.

David Goh drafted this letter - land conversion.

Letters to Land & Survey was a cosmetic ploy reason being a Bumiputra. Paragraph 1 - from commercial zone knowing that it was already approved for residential use.

At p. 23 notes of proceedings, Ismawi further said:

The Land & Survey officers discussed with us. And the effect to have 2 applications submitted to Land & Survey so that Land & Survey would not act on either. Therefore that would delay the approval to the Power of Attorney holder.

At p. 24 notes of proceedings, Ismawi further said:

(page 113) Engineering plan approved on 2nd April, 1994.

Bacom felt that Jong Chuk would be able to carry on with the project, use the extension clause of 6 months and complete the project.

We unilaterally withdrew or revoke his Power of Attorney.

From the beginning Bacom had wanted the land. Bacom had no intention to allow Jong Chuk with the development.

There was discussion with bank for the development.

From the company's view, Jong Chuk or Water Theme Park - Water Theme Park was more lucrative.

Water Theme Park is a recreational park of about 10 acres - a combination of 3 pieces of land.

Under cross-examination by the then learned counsel for 6D/TP, PW2 (at p. 25 notes of proceedings) said:

Approval for Lot 29 - residential purposes.

Paragraph 2 (page 83) read.

We did not because we want to delay. It was a tactical move not to submit.

I gathered from the letter.

(Page 30 AB) Bacom inquired from Land & Survey as a camouflage to find out as to our application.

The evidence of Ismawi Batu stood unchallenged. The then learned counsel for 6D/TP had the unenviable task of cross-examining Ismawi because at that time on 14 November 1996, the agreed issue 6 was whether 6D/TP was bound by the said agreement. As pleaded in para. 4 of the re-amended defence, the case of 6D/TP was that the plaintiff refused to proceed as attorney or agent of 6D/TP. It was only later that David Goh admitted 6D/TP was bound by the said agreement at the trial on 8 November 1997 (p. 56 notes of proceedings), and during his cross-examination on 12 and 13 February 1998. He had to admit 6D/TP was bound because the evidence, both oral and documentary, is abundantly clear against his company, 6D/TP.

Eric Tan Kok Cheong (PW3), the former senior manager of 6D/TP, corroborated the evidence of PW2. Under cross-examination (p. 26 notes of proceedings), PW3 said:

I know that Bacom bought Lot 29 in 1993.

David Goh told me about his plan - he wanted to develop the land with adjoining land into a huge Water Theme Park.

Jong Chuk was Power of Attorney holder and was an obstacle to land.

David Goh asked me in early 1994. I was called back from Kuantan and I was to negotiate and make an offer to Jong Chuk.

In February 1994 and I approached Jong Chuk.

Jong Chuk did not agree to any proposal.

I met him a couple of times to make offers to him and to convince him to quit.

He did not quit.

In April 1994 I heard from David Goh the Power of Attorney was revoked because Jong Chuk was serious in the development.

He was going ahead with the development plan and the company's plans would be jeopardised.

PW3's evidence also stood unchallenged.

The last witness for the plaintiff was Mark Chin Ted Swee (PW4), a senior advocate. He said that the 1st - 5th defendants did not complain about the delay of the project (p. 28 notes of proceedings). He said (at p. 28 notes of proceedings) that in a meeting in his office shortly after the sale of the said land by the Chongs to 6D/TP, the Chongs assured and told the plaintiff not to worry and that the new landowners (*ie*, 6D/TP) would honour the said agreement. The plaintiff closed his case, and adduced no further evidence thereafter.

1st - 5th Defendants' Case

The 1st - 5th defendants claim against 6D/TP for indemnity/contribution in the event they were held liable for the plaintiffs claim against them, in para. 2 of the 1st - 5th defendants amended statement of claim against 6D/TP.

By the sale & purchase agreement dated 25 May 1993 (the 2nd agreement) between the 1st - 5th defendants and 6D/TP, the former sold the said land to 6D/TP. Under cl. 7, 6D/TP has expressly declared that it had full knowledge and understanding of the said agreement between the plaintiff and the 1st - 5th defendants (para. 6 amended defence).

Under cl. 8 of the sale & purchase agreement, 6D/TP had, *inter alia*, agreed to keep the 1st - 5th defendants indemnified against all actions, demands, damages, penalties, costs, charges and expenses by reason of non-observance of the said agreement (para. 7, amended defence).

David Goh (6DW1) had in his evidence in chief stated that 6D/TP would be bound by the said agreement. Under cross-examination by Mr Wong Kim Fatt, learned counsel for the plaintiff, David Goh had admitted without any reservation that 6D/TP was bound by the said agreement from the beginning. David Goh said at p. 82 of the notes of proceedings as follows:

I consider that Bacom Enterprise bound by the development agreement.

I consider the company bound right from the beginning.

At p. 90, David Goh said:

> We are bound by the Agreement to the Chong family.
>
> I have to honour the development agreement.

Under cross-examination by learned counsel for the 1st - 5th defendants, David Goh said (at p. 95 notes of proceedings):

> I understand clause 7.
>
> I have knowledge and understanding of the development agreement. Bacom would be bound by the provisions of development agreement.

When cl. 8 of the 2nd agreement was referred to, 6DW1 said (at p. 96 notes of proceedings):

> I understand the indemnity clause when I signed the Agreement.
>
> It will perform and observe the provisions of the development agreement that the Chongs agreed to perform.
>
> Bacom will keep the Chongs indemnified in all actions, claims, demands, damages, penalties caused, charges and expenses by reason of non-observance of the development agreement in so far as clause 8 is concerned.

By the express provision in cl. 8 of the 2nd agreement and by the admission of 6W1, 6D/TP is clearly liable to the 1st - 5th defendants for indemnity and contribution for all costs and damages to the plaintiff's claim in this action.

At the outset of this action, the 1st - 5th defendants had no knowledge that 6D/TP had no real intention to be bound by the said agreement. The plaintiff's re-amended statement of claim against 6D/TP stated that it had falsely and/or fraudulently represented to the 1st - 5th defendants that 6D/TP would honour and abide by the said agreement when it never had any real intention to do so as it had a separate plan to develop the said land into a Water Theme Park.

According to the former Group Chairman of 6D/TP, Ismawi Batu (PW2), the purpose for the purchase of the said land by 6D/TP was to convert it into a Water Theme Park and that 6D/TP had no intention to allow the plaintiff to continue with the development of the said land.

Under cross-examination by the then learned counsel of 6D/TP, PW2 said at p. 25 of the notes of proceedings:

> Approval for Lot 29 - residential purposes.
>
> Paragraph 2 (page 83) read.
>
> We did not because we want to delay. It was a tactical move not to submit.
>
> I gathered from the letter.

...

(Page 80 AB) Bacom inquired from Land & Survey as a camouflage to find out as to our application.

PW3, former senior manager of 6D/TP, testified in his examination-in-chief:

I know that Bacom bought Lot 29 in 1993. David Goh told me.

Jong Chuk had a development agreement and Power of Attorney over this land. David Goh told me about his plan - he wanted to develop the land with adjoining land into a huge Water Theme Park.

Jong Chuk was Power of Attorney holder and was an obstacle to land.

Mr Chong Tung Shin (DW1) in his examination-in-chief (at p. 32 notes of proceedings) said:

Land sold to Bacom Enterprise ...

I was not aware that Bacom proposed to build a Theme Park before sale of land to Bacom.

The intention to sell to Bacom was to ensure that the development agreement continued.

If we knew of Bacom's proposal, we would not have sold the land.

Under cross-examination by learned counsel for 6D/TP. DW1 (at p. 33 notes of proceedings) said:

The land is 3 acres.

We would not sell to Bacom if the intention was not to continue the development.

Before the sale of land, we had discussion with David Goh at my house.

We discussed with David Goh, David Goh will purchase and will comply with Agreement we signed with Jong Chuk.

DW2, Denis Chong Sing Kong, testified (at pp. 35 and 36 of the notes of proceedings) under examination-in-chief:

Bacom is the 6th defendant and 3rd party.

He was interested in a piece of land owned by my father and uncles. This is Lot 29, Block 218 KNLD.

He was interested in buying the land.

I told David that my uncles and father had entered a development agreement and Jong Chuk and asked him to see Jong Chuk first. ...

Since Bacom had come to see me, it was interested in the land, the landowners willing to sell so long as it binds the purchaser. ...

> Chongs met with Bacom Enterprise and that in Agreement (page 29) Bacom bound.
>
> ...
>
> Bacom had, before the sale, proposal to turn into a Family Park - I don't know. If I knew, my father and uncles would not have agreed with Bacom.

DW3, Chong Tung Fatt (the 5th defendant) at p. 41 notes of proceedings, states:

> Agreement with Bacom (page 29) - paragraph 8. Bacom must follow the Agreement with Jong Chuk. Bacom agreed that sale agreement subject to Agreement with Jong Chuk.
>
> If we were aware of Bacom's intention not to follow the Agreement - we would net have agreed to sell to Bacom.
>
> If we have known of Bacom's Family Theme Park we would have not agreed to sell to Bacom.

Under cross-examination by learned counsel for 6D/TP, DW3 said (at pp. 43 and 44 notes of proceedings):

> I and brothers willingly sold the land to Bacom after he agreed to be bound by Agreement. ...
>
> We were assured that David Goh the new landowner was to adhere and honour the development agreement.

Case Of 6D/TP

6D/TP called 11 witnesses who gave evidence during the period 8 August 1997 - 21 August 1998. The key witness for 6D/TP was David Goh (6DW1), who was its mastermind. His examination-in-chief alone took five days (pp. 49 - 81 notes of proceedings) and his cross-examination and re-examination took another four days.

I had closely observed the demeanour of David Goh (6DW1) throughout the nine days that he testified, and I am of the opinion that he is not a truthful witness. 1 prefer the evidence given on behalf of the plaintiff and the 1st to 5th defendants to the evidence given by David Goh on behalf of 6D/TP. David Goh was as cunning as a fox. He was very evasive and unreliable. This can be seen as follows.

David Goh appeared to be dissatisfied with the earth-filling and non-starting of construction work on the said land but agreed that under cl. 5 of the said agreement, the filling of the said land to a suitable level was "to be determined and approved by the relevant authority". Earth filling of the said land was really not an issue. That disposed off his lame excuse on earth-filling and pre-

empted the evidence of his expert witness Associate Prof. Bujang (6DW7), who made many drill holes on the said land in order to find out the type of land-fill material and thickness of the fill above the original ground. Associate Prof. Bujang of the Engineering Faculty of UNIMAS gave evidence on the technical aspects of his tests. However, his cross-examination by Mr Wong and his learned junior Mr Albert Tang showed that the Professor's expert opinion did not really assist the court on the issues to be tried.

Initially, an issue to be tried was whether 6D/TP was bound by the said agreement. However, in the course of the trial, David Goh admitted that 6D/TP was bound by the said agreement. There was no allegation of breach committed by the plaintiff in David Goh's letter of 6 July 1993 (AB 87) in reply to the important letter of 24 June 1993 (AB 81) from the plaintiffs solicitors. It should be noted that David Goh admitted (at p. 92 of the notes of the proceedings) that the plaintiff could not commence work before the engineering plans were approved on 2 April 1994. He seemed to agree that his letter of 9 October 1993 (AB 106) to the plaintiffs solicitors was premature. In my opinion, there can be no doubt, from the documentary evidence and the admission of David Goh, 6D/TP was bound by the said agreement to the plaintiff.

David Goh knew of the approval of the plaintiffs engineering plans in 1994. His statement that he knew of the approval of the engineering plans (on 2 April 1994) only at the trial (which began 2½ years later on 11 November 1996) is simply not credible in the light of his hasty and wrongful action to revoke the Power of Attorney and his letters of 14 May 1994 (AB 123) to the Land & Survey Department and KRDC (AB 118) and in the light of the evidence of the council engineer, Mr Chen Chi Yong (6DW3) who said (at p. 115 Notes of Proceedings): "I might have told him [David Goh] the engineering plan must have been approved." That was in April 1994. David Goh knew, or must have known, of the approval of the engineering plans in April 1994 before he revoked on 30 April 1994 the plaintiff's Power of Attorney, not 2½ years later during the trial in November 1996.

On his letter of 28 August 1993 (AB 98) David Goh did not allege the breach against the plaintiff (p. 91 notes of proceedings) and in his letter of 24 September 1993 (AB 101) David Goh agreed he did not give notice to terminate under cl. 18 of the said agreement. He admitted that the plaintiff could not carry on his project after the revocation of the Power of Attorney. David Goh's answer on his letter to the Land & Survey Department (AB 78 - 79) on conversion to Water Theme Park was evasive and not truthful and cannot be accepted.

All this clearly shows the fraudulent intention and conduct on the part of David Goh and 6D/TP not to honour the said agreement, within the ambit of s. 17(c) and (d) of the Contracts Act 1950.

Under cross-examination by learned counsel for the 1st - 5th defendants, David Goh admitted that the plaintiff was in a position to complete the project within the stipulated time, which means that the plaintiff would not be in breach for failing to complete the project in time. The entitlement of 6D/TP was six units of houses. David Goh said (at p. 100 of the notes of proceedings):

Put : If Jong Chuk had completed the project, Bacom would have 6 units of houses.

Ans : That's correct.

Q : Jong Chuk should have completed the project in 1994 - 1995?

Ans : Yes, or under 6 months allowance 1995

Q : Do you know the prices of house?

Ans : In 1993 my estimate for those 6 houses was RM1.2 million.

Q : You bought the land for RM1.43 million for 6 vacant lots and the 6 units cost RM1.2 million?

Ans: Best estimate at the time of RM1.2 million.

David Goh in the examination-in-chief, at p. 49 notes of proceedings, said:

I am the principal person behind the Bacom.

Looking for various properties in Kuching with initial inquiries in some location - not successful. Attention drawn to a piece of land along Jalan Keretapi.

In these vacant parcels of land given to me - there were 6 lots and I was interested in 4 lots. They are Lots 29,26, 144 and 23.

I was successful in Lots 26 and 29.

I was interested in 4 lots - initial idea food court, water theme park, commercial condo complex and the Mall.

It was never an issue - because I was agreeable to the term and condition. I agreed to be bound by the terms and conditions. (Page 56 notes of proceedings):

Although 6DW1 said that the idea of the Water Theme Park came after the purchase of Lot 29, there is ample evidence to contradict this.

According to 6DW1 the initial objective of buying Lot 29 was road frontage - it would enhance the value of Lot 26. This piece of evidence is totally destroyed by the following evidence.

David Goh under cross-examination agreed that 6D/TP would be bound by the said agreement, but he disagreed that the purpose of buying Lot 29 was to turn it into a Water Theme Park (p. 100 notes of proceedings). Under the said agreement 6D/TP is entitled to only five semi-detached and one terrace house which after completion were worth about RM1.2 million. Yet he said he paid RM1.43 million for the six vacant lots, including a very high commission of RM230,000 paid to Denis Chong (DW2).

Immediately after the purchase of the said land, 6D/TP wrote to the Land & Survey Department with the intention of turning the said land together with other lots to a Water Theme Park (AB 78).

Under cross-examination (p. 99 Notes of Proceedings) he said:

Q : If Jong Chuk were to carry out his development plan it would prejudice your plan?

Ans : No. I disagree.

Put : That is why Bacom wrote to Land & Survey to apply to turn to Theme Park.

Ans : No. It was an inquiry.

Put : Would you accept if Land & Survey approved your application?

Ans : If Land & Survey approved the application, we would consult

Q : Would Bacom accept it on principle?

Ans : Yes.

The road frontage argument for Lot 26 cannot be supported for the simple fact that upon completion of the said agreement, 6D/TP is entitled to six houses which have access to the main road in any event.

This is confirmed by the evidence of Mr Chen Chi Yong (6DW3) (at p. 115 notes of proceedings). Another witness for 6D/TP, Mr Victor Fong (6DW2), under cross-examination (at p. 118 Notes of Proceedings) said:

I did not know about the agreement on Lot 29 earlier.

Under the Agreement (Lot 29) Bacom gets 5 Semi Detached and 1 Double Storey corner terrace house.

Lots no. 5, 20-24 - 6 units of house which Bacom is entitled.

Had I known, I would advise against buying Lot 29.

It would not be necessary.

6DW10, Mr Tan Boo Eng, another witness for 6D/PP told the court that 6DW1 wanted to buy his parcel of land Lot 144 which is adjacent to Lots 29 and 26 for the purpose of Water Theme Park (pp. 141 - 142 notes of proceedings).

Based on the oral and documentary evidence, I find that there is ample evidence to establish the plaintiff's claim and the 1st - 5th defendants' claim that 6D/TP had no intention to be bound by the terms and conditions of the said agreement from the very beginning as it had at all material times the intention to convert the said land into a water theme park.

I hold that 6D/TP's express representation contained in cl. 7 of the 2nd agreement that it would be bound by the provisions of the said agreement is clearly a false and untrue statement.

6D/TP Title Defeasible

Therefore, the Sale & Purchase Agreement (2nd agreement) and the memoranda of transfer were procured by the fraud of 6D/TP through David Goh, and are therefore null and void, and ought to be set aside for fraud. I find that the title of 6D/TP to the said land is not indefeasible by reason of fraud of 6D/TP perpetrated through its alter ego David Goh.

Indefeasibility Of Title Except Fraud

Section 132(1) Sarawak Land Code (Cap 81) provides that:

> ... the registered proprietor of any estate or interest to which this section applies shall, except in the case of fraud, hold such estate or interest subject to the interest noted on the Register ...

The effect of fraud is provided under s. 134(1) Sarawak Land Code which states:

> Any issue document of title or entry or alteration in the Register procured or made by fraud shall be void against any person defrauded, or who may be defrauded, thereby, and no person who is a party or privy to the fraud, or who claims solely as a volunteer under such person, shall take any benefit therefrom.

In *Loi Hieng Chiong v. Kon Tek Shin* [1983] 2 MLJ 31 a case involving an exchange of lands in Sarawak between two parties, the Federal Court held at p. 36 that:

> ... fraud must be actual. There must be dishonesty of some sort. Fraud may be established if the designed object of a transfer is to cheat a man of a known existing right; or where by a deliberate and dishonest act a person loses an existing right.

The Federal Court upheld the High Court decision that the memorandum of transfer was *void ab initio* for fraud.

At the High Court level, his Lordship George Seah J (as he then was), in a detailed judgment (unreported) on ss. 132 and 134(1) of Sarawak Land Code on the issue of fraud, said:

> Fraud is not statutorily defined in the Land Code (Cap 81) but since the Land Code is based primarily on the Torrens System, the Federal Court in *Assets Co. Ltd vs Mere Roihi* [1905] AC at p. 210 has this to say:
>
> > ... by fraud in these Acts meant actual fraud, *ie*, dishonest of some sort, not what is called constructive or equitable fraud ...

His Lordship further said:

> Now, a contract for the sale of land is not a contract uberrimae fidei which there is absolute duty upon each party to make a full disclosure to the other of all material facts within his knowledge (see *Brownlie vs Campbell* [1880] 2 App. Cas at p. 954). But a party who has been induced to enter a contract by a misrepresentation made by the other party may treat the misrepresentation made by other party as a defence to an action for specific performance or as a ground for rescission. A misrepresentation, in order to have legal effect, must be a false statement by one party of some material fact which has induced the other party to enter into the contract.

Since fraud has been proved to the satisfaction of the court, it follows that the purported transfer and registration of the said land in the name of 6D/TP would be void against the 1st – 5th defendant, the party defrauded. Section 134(1) provides that "no person who is a party to the fraud should take any benefit therefrom ...

In the Federal Court, his Lordship Syed Othman bin Ali, F.J. at p. 35 said:

> As regards the law, it has been said that the courts have so far not ventured to lay down as a general proposition what amounts to fraud. It can only be determined from acts and circumstances of a particular case. It usually takes the form of a statement of what is false or a suppression of what is true. Where the relative position of the parties is such as raises the presumption of an unconscientious use of power arising out of the circumstances and conditions, the transaction cannot stand unless the person claiming benefit of it is able to repel the presumption by contrary evidence proving to have been in point of fact, fair, just and reasonable *per* Lord Selborne, L.C. in *Earl of Aylesford v Morris* [1873] 8 Ch App. 484; See also *Fry v Lane* 40 Ch.D 312.
>
> In *Derry v Peek* [1889] 14 App. Cas. 337, 374 it was held that to establish fraud it is necessary to prove the absence of a honest belief in the truth of that which has been stated; in the words of Lord Herschell "Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false.

In *Ang Hiok Seng @ Ang Yeoh Seng's case (supra)* the Federal Court held that where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is beyond reasonable doubt and not a balance of probabilities. An allegation of criminal fraud in civil or criminal proceedings cannot be based merely on suspicion or speculation. However, where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, a balance of probabilities is applicable. In this case since the allegation of fraud against 6D/TP is purely civil in nature and not based on or connected with a criminal offence, the civil standard is applicable.

In *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 the Federal Court upheld the decision of the High Court that the transfer of the land was obtained by fraud and could be set aside despite its registration, as fraud had been brought home to the persons whose registered title was impeached. His Lordship Raja Azlan Shah, CJ (Malaya) (as His Majesty then was) said at p. 138:

> Whether fraud exists is a question of fact, to be decided upon the circumstances or each particular case. Decided cases are only illustrative of fraud. Fraud must mean "actual fraud, *ie*, dishonesty of some sort" for which the registered proprietor is a party or privy. "Fraud is the same in all courts, but such expressions as "ccnstructive fraud" are ... inaccurate:" but "'fraud' ... implies a wilful act, on the part or one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled.

Has The Plaintiff Acquired Beneficial Interest In The Said land?

Under the said agreement the plaintiff is entitled to 18 units and the 1st - 5th defendants six units. Even if the plaintiff had completed the project, the plaintiff cannot claim to have the beneficial interest in the whole of the said land. This is because the said agreement is not a contract for sale of land. The court cannot order specific performance of the transfer of the whole said land from 1st - 5th defendants to the plaintiff in any event. However, cl. 18(ii) of the said agreement (AB 8) appears to confer a contractual right on the plaintiff to lodge a caveat against the said land.

In *Dr Michael Atun Wee v. Malaysia Credit Finance Bhd & Ors* [1994] 3 MLJ 594 the plaintiff and five others were the registered co-owners of a piece of land. By a written agreement they agreed with a developer for the latter to develop and sub-divide the property and then to retransfer one of the lots back to the co-owners after the sub-divided title had been issued. On the issue

whether the plaintiff was at all material times the true legal and beneficial owner of the property and whether the "bare trust" rule applied in that case, the Supreme Court held that:

> (1) The effect of a bare trust alters the relationship of the parties from that of vendor/purchaser to that of trustee/beneficiary. In the present case the agreement was, however, not a contract for sale of land and, therefore, no vendor/purchaser relationship existed. It was an agreement made between co-owners of the property and an individual developer for the latter to develop the property. The relationship that existed was purely contractual and did not create any trust relationship between them in respect of the property ...
>
> (2) The rule that the moment there is a valid contract for sale, the vendor becomes in equity a trustee for the purchaser, is not absolute because it is only applicable if specific performance of the agreement between the vendor and the purchaser can be ordered by the court. Otherwise, the trusteeship does not arise ...

In the present case, cl. 22 of the said agreement provides:

> This Agreement shall be binding upon the successor-in-title, assigns and personal representatives of the respective parties hereto.

Having regard to matters pleaded in paras. 19 to 21 of the plaintiff's re-amended statement of claim, it is clear that the plaintiff has accepted and relied upon cl. 22 of the said agreement as a provision that entitled the 1st - 5th defendants to sell the said land to 6D/TP and that the latter is bound by the terms and conditions of the said agreement.

The plaintiff in para. 17 of his re-amended statement of claim, alleged that the 1st - 5th defendants were in breach of the said agreement when the 1st - 5th defendants sold the said land to 6D/TP without the plaintiffs knowledge or consent in para. 12 of the defence of the 1st - 5th defendants, they aver that they are entitled to sell the said land to the 6D/TP without the consent and/or notice of the plaintiff, and therefore they are not in breach of the said agreement in selling the said land to 6D/TP.

The plaintiff *vide* the Caveat Instrument no. L7362/1993 lodged against the said land has stated, *inter alia*, the grounds for lodging the caveat as:

> a) The said land has been transferred to Bacom Enterprises Sdn Bhd [6D/TP] on 27th May 1993;
>
> b) Simultaneously with the transfer aforesaid Bacom Enterprises Sdn Bhd has registered a Power of Attorney vide Instrument no. L6774193 of 27th May 1993 appointing me [the Plaintiff] as its attorney in terms thereof ...

c) The aforesaid Power of Attorney by Bacom Enterprises Sdn Bhd is expressly made supplemental to the said Agreement by clause 3 of the aforesaid Power of Attorney.

d) By virtue of Clause 22 of the said Agreement annexed hereto the said Agreement is binding on Bacom Enterprises Sdn Bhd as the successors-in-title of Chong Tung Sang, Chong Tung Shin, Chong Nyuk Yun @ Chong Nyet Yun (f). Peter Chong Kui Choi and Chong Tung Fatt alias Joseph [the 1st - 5th Defendants herein], the predecessors-in-title of the said land.

The plaintiff in his cross-examination (at p. 11 of notes of proceedings) said:

Question : It did not matter who was the owner of land?

Answer : Yes.

Question : Did you meet Joseph Chong Tung Fatt (5th defendant) - identified

Answer : Yes, I met in Mark Chin's office.

Question : Is this the time you withdrew the caveat?

Answer : I went to see lawyer Mark Chin and I came to know the land was sold. I met him at the lawyer's office.
As long as the purchaser adheres to the Agreement.

This is supported by the plaintiffs advocates' letter dated 14 July 1993 (AB 89) to 6D/TP which, *inter alia*, stated that:

> It is not important to our client who the land-owners of captioned are but it is vitally important to our client that such land-owners should abide by the terms and conditions of the development agreement ...

The plaintiff has also said (at p. 12 notes of proceedings) that cl. 22 of the said agreement binds the buyer and that if the relation with Bacom (6D/TP) has not broken down he would not have sued the defendants.

In *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; [1993] 3 MLJ 633, Edgar Joseph Jr SCJ in deciding the effect of a joint-venture agreement which had a clause almost identical to the cl. 22 said at p. 483:

> By cl 22 of the joint-venture agreement, it was expressly provided that this agreement shall be binding on the heirs, personal representatives, successors-in-title and assigns of the respective parties hereto.
>
> I accept that this may well be an unusual clause to find in a joint-venture agreement in the construction field where subjective considerations relating to the contractor and the employer can be most material; yet the parties deliberately chose to insert it ... It is obvious, therefore, that it was the intention of the parties,

> judged purely from the words appearing in cl 22, that both the parties to the joint-venture agreement ... were to be at liberty to assign their right, title and interest under it without the need for consent by the other party ...
>
> Moreover, as it happens, the conduct of the parties following the execution of the joint-venture agreement reinforces the view that it was their intention that their right, title and interest thereunder were to be freely assignable.

In the circumstances, the plaintiff has clearly accepted that the 1st - 5th defendants are entitled under cl. 22 of the said agreement to sell the said land to 6D/TP without the knowledge or consent of the plaintiff. Moreover, the plaintiff had by his conduct, acquiesced in 6D/TP stepping into the shoes of the 1st - 5th defendants for the purpose of carrying out the development of the said land. This is evidenced by the various correspondence between the plaintiff and 6D/TP since 8 June 1993 until 29 September 1993. The plaintiff did not object or complain about the sale of the said land to 6D/TP. See *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor (supra)*. In my view, the 1st - 5th defendants are entitled to sell the said land to 6D/TP without the knowledge or consent of the plaintiff, and so I hold.

The plaintiff has by his conduct expressly and impliedly evinced an intention that he has approbated the sale of the said land to 6D/TP and he has actively encouraged the 1st - 5th defendants to believe that he has agreed to the said sale without any objection or complaint. As such the plaintiff is estopped from asserting so. See *Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331.

1st - 5th Defendants Not Liable

In the circumstances, I hold that the 1st - 5th defendants are not liable to the plaintiff for loss, damages and costs as alleged in the plaintiffs re-amended statement of claim over the sale of the said land by the 1st - 5th defendants to 6D/TP. The loss, damages and costs incurred by the plaintiff and 1st - 5th defendants are clearly caused by the wrongful action of 6D/TP, which breached the said agreement and the 2nd agreement, and as such, I hold that all these loss, damages and costs should be borne solely by 6D/TP.

2nd Agreement Null And Void

I hold that the sale & purchase agreement (2nd agreement) dated 25 May 1993 is null and void and order that 6D/TP will deliver to the 1st - 5th defendants the issue document of title and quit rent book relating to the said land.

Transfers Set Aside

The Memoranda of Transfer (AB 42 - 51) by the 1st - 5th defendants are hereby set aside and I direct the Land & Survey Department and its proper officer to cause the name of 6D/TP as registered proprietor of the said land be cancelled, and the said land be re-registered in the names of the 1st - 5th defendants in equal share.

Damages And Costs

I order 6D/TP to pay:

(a) to the plaintiff -

(i) Damages for breach of the said agreement and for fraud, to be assessed, and

(ii) Costs to be taxed and paid forthwith, with a certificate for two counsel.

(b) to the 1st - 5th defendants -

(i) Damages for breach of the 2nd agreement and for fraud, to be assessed, and

(ii) Costs to be taxed and paid forthwith.

The quantum of damages will be assessed by the deputy registrar. The granting of a certificate for two counsel, whether from the same legal firm or not, is a matter of discretion for the trial judge, to be exercised in an appropriate case. Generally speaking, such a certificate is not to be given liberally. In granting the oral application of Mr Wong made immediately after the delivery of my judgment for a certificate for two counsel under O. 59, r. 19, Rules of the High Court 1980, I had taken into account the following material factors:

a) 6D/TP had engaged counsel followed by the plaintiff,

b) prolixity of the proceedings,

c) the lengthy written submissions of learned counsel for the parties and the various authorities cited by them,

d) the difficulty of the issues of law and facts to be determined,

e) the amount at stake to the parties, and

f) the questions of indefeasibility of title, restoration and restitution, refund of the purchase price, damages and specific performance.

Restoration/Restitution And Specific Performance

As the sole fraudulent party is 6D/TP, it cannot take advantage of its wrong doing or fraud. See *Alghussein Establishment v. Eton College* [1988] 1 WLR 587 (HL) and *Cheall v. Apex* [1983] 3 All ER 1130. The court cannot lend its hand to a party guilty of fraud. See *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd* [1996] 4 CLJ 52; [1996] 2 MLJ 431. Learned counsel for the plaintiff and the 1st - 5th defendants quite properly brought to my attention the cases of *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91, *Suu Lin Chong v. Lee Yaw Seong* [1979] 2 MLJ 48 and *Yeep Mooi v. Chu Chin Hua & Ors* [1981] 1 MLJ 14 and ss. 65 and 66 of the Contracts Act which read as follows:

> **65 Consequences of rescission of voidable contract**
>
> When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received.
>
> **66 Obligation of person who has received advantage under void agreement, or contract that becomes void**
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

In the circumstances of the case, having considered these authorities and ss. 65 and 66 of the Contracts Act, relating to restoration and restitution as well as the submission of Mr Naban, learned counsel for 6D/TP, I am of the opinion that, notwithstanding the fraud on the part of 6D/TP, it is just and equitable that the 1st - 5th defendants will refund to 6D/TP the whole of the purchase price, *ie*, the sum of RM1.2 million, less by way of set off the damages and costs due to the 1st - 5th defendants. In ordering the refund, I have taken into account the factors that the 1st - 5th defendants will get back their land and will be compensated by damages and costs to be paid by 6D/TP. The plaintiff will have the said agreement restored and specifically performed by the 1st - 5th defendants and he will also be compensated by damages and costs to be paid by 6D/TP, which has brought about these protracted proceedings. (David Goh stated that 6D/TP paid up a total sum of RM1.47 million, comprising RM1.2 million as the purchase price of the said land, RM230,000 being commission paid to Denis Chong (DW2), and RM40,000 being legal fees.) From the said sum of RM1.2 million, the plaintiff shall be paid his assessed damages and taxed costs, if these cannot be agreed.

The plaintiff may, however, proceed to recover his damages and costs directly against 6D/TP.

The orders in paras. 65 and 66 above will take effect after the 1st - 5th defendants have settled the balance of the purchase price, if any, (mentioned in para. 68 above) to 6D/TP, or upon depositing the sum of RM1.2 million into court, or by furnishing a Bank Guarantee in favour of the Registrar of the High Court for such sum and on such terms as approved by the court.

It is further ordered that the 1st - 5th defendants do specifically perform the said agreement of 22 October 1991 (AB 3) with the plaintiff and re-execute their Power of Attorney as before. The plaintiff is given a further period of 18 months (excluding further extension under the said agreement) from the date of re-execution of the Power of Attorney and re-approval of the engineering plans, if necessary, whichever shall be the later, to restart the development project. In this connection, the plaintiff is at liberty to lodge a caveat against the said land.

The counterclaim of 6D/TP is hereby dismissed with costs. There will be liberty to apply in respect of the implementation of my orders made herein.